nearby utility vaults. Approximately 50.4 gallons of petroleum product in the utility vaults was quickly removed and had no detectable impact on the environment. (*See* Report on Monitoring Well Installation, dated May 30, 1984 to Mr. Alex Evins of Diamond Shamrock Corporation from Law Engineering Testing Company, attached as Exhibit E ("Law Engineering Report")). According to the Law Engineering Report, the petroleum contamination detected in the groundwater at the Roseville Site in 1985 may have come from a source upgradient of the Roseville Site USTs (*i.e.,* the nearby Regal Gas Station) as Law Engineering observed that the monitoring wells closer to the Regal Gas Station contained elevated levels of petroleum contamination.

In addition, the Regional Board's course of action in adopting the Orders provided little consideration or, or protection for the due process interests of VRG implicated by the Orders. Although the Regional Board established contact with VRG in the fall of 2007, and solicited VRG's input on draft versions of the CAO, which were submitted in the November 15, 2007 letter, the Regional Board has no further contact with VRG after its submission of the November 15, 2007 letter. The Regional Board did not respond to VRG's comments. The Regional Board never provided notice to VRG that is planned to disregard the substance of the VRG comments, and no verbal or written advance notice of the planned issuance of the Orders was provided, nor was an opportunity for a hearing on the Orders before the Regional Board granted. In fact, Regional Board staff denied VRG's April 29, 2008 request for hearing by the Regional Board, and directed VRG to instead petition the State Board.

II. THE ORDERS FAIL TO PROPERLY DESIGNATE THE STATUS OF POTENTIALLY RESPONSIBLE PARTIES.

A. Applicable Law.

As noted below, a Cleanup and Abatement Order under CWC § 13304 casts a broad net over parties that may be liable under such an order.

> "Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be,

discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste . . ." (emphasis added)

However, this authority is not without bounds. The State Board in issuing Policy 92-49, provided a metric as to procedures the Regional Boards should follow in issuing Cleanup and Abatement Orders. And, during the mid-1980s, the State Water Resources Control Board ("State Board") issued a series of decisions in response to numerous dischargers who appealed their alleged liability under Regional Board Cleanup and Abatement Orders. In these decisions, the State Board interpreted § 13304 liability impose liability on, *inter alia,* operators that used hazardous materials at contaminated properties as well as the owners who "permitted the discharge of waste" through leasing their property to others discharged waste onto their property. (*See In the Matter of Harold and Joyce Logsdon,* WQ Order No 84-6 (owner of a site is liable for leasing site to industrial tenant and "permitting" the discharge of waste)). However, as discussed below, the State Board concluded that not all dischargers are equally liable and established factors for the Regional Boards to determine whether a discharger had "primary responsibility" or had "secondary responsibility" to clean up the site -- that is, secondarily responsible parties are only obligated to cleanup the site if the primarily responsible party is unable or unwilling to engage in cleanup activities. The distinction between primary responsible parties and secondary responsible parties is particularly important in multi-party site cleanups, where as in this matter, several parties can be held liable for the contamination found at a site.

1. The Orders Must Comply with State Board Precedent.

In recognition that not all dischargers are equally liable for the contamination at a given site and that it would be unfair to require dischargers with little or no legal responsibility for the contamination at a site as those who greatly contributed contamination at the site, the State Board established a several "equitable" factors that the Regional Boards should consider when deciding to categorize parties as primarily responsible parties and secondarily responsible parties. (See *In the Matter of Petition for Review Wenwest, Inc, Susan Rose, Wendy's International, and Phillips Petroleum,* WQ 92-13 ("Wenwest")). There are certain categories of parties that are always considered secondarily responsible parties, such as past owners of a site whose ownership predates or postdates the date of the alleged

discharge. *Id.* To determine if parties other than past property owners at the time before or after a release occurred may be secondarily responsible, the State Board must consider the unique factors that apply to the dischargers. (*See Wenwest and In the Matter of Petition of Prudential Insurance of America,* Order No. WQ 87-6 ("Prudential") *and Petition of John Stuart, Order No. WQ 86-15* ("Stuart")). The unique factors that apply to this case are:

1. Was the release a result of a single leak or an ongoing release? (*Wenwest*).
2. Did the (prior owner) have a significant ownership interest in the property at the time of the discharge? (*Stuart*).
3. Did the discharger have knowledge of the activities, which resulted in the discharge? (*Stuart*).
4. Did they have the legal ability to prevent the discharge? (*Stuart*).
5. Were there multiple responsible parties who are also properly named in the Order? (*Wenwest*).
6. Does the discharger have a legal obligation to carry out the cleanup if other parties are currently cleaning up the site? (*Prudential*).
7. Is the cleanup being progressed by another responsible party? (*Prudential).*

The failure to consider these factors to determine whether a party is a primary or secondary responsible party before issuing a CAO is an abuse of discretion. (*Prudential).*

2. The Orders Must Comply with State Board Policy Number 92-49 ("Policy 92-49").

State Board Policy 92-49 and CWC § 13307 requires the Regional Board to follow certain procedures to ensure that investigations and cleanups are conducted in an efficient and orderly fashion (i.e., "step-by-step" basis). Among the requirements of Policy 92-49 and CWC § 13307 are that the Regional Board:

1. Develop procedures to make decisions as to when a person may be required to undertake an investigation and cleanup;
2. Develop policies to ensure that investigations are conducted in a phased "step-by-step" manner;

3. Develop procedures that consider the most "cost-effective" means for cleaning up and abating pollution; and

4. Developing policies to determine reasonable schedules for investigation and cleanup, abatement or other remedial action at a site, considering the danger to public health and environment caused by the release and the financial and technical resources of the persons responsible for the discharge.

These policies provide flexibility to the Regional Board to implement fair investigation and clean up orders to the potentially responsible parties that are protective of the environment and are well managed to reduce the burden on the public's financial and technical resources. As discussed in detail below, the Orders fail to comply with Policy 92-49 and CWC § 13300 *et seq*. because the Orders will cause VRG to duplicate a significant amount of work conducted to date by RPMS; require VRG to accept (without review and analysis) prior investigation and cleanup recommendations; force VRG to conduct future time scheduled activities as required in the Orders because it cannot ascertain whether the primary responsible parties will comply these activities; and require VRG to comply with certain time scheduled activities that are being handled by the existing primary responsible parties.

B. Analysis: The Regional Board Abused Its Discretion by Failing to Classify VRG as a Secondary Responsible Party Pursuant to State Board Precedent.

The Regional Board abused its discretion because it failed to consider the below equitable factors to classify VRG as a secondary responsible party. Applying those equitable factors reveals that RPMS and JEM1 are the primarily responsible parties and VRG should be named only as secondarily liable. Based on the factors that the State Board has historically considered in determining whether a party is to be considered secondarily liable, VRG should be afforded secondarily responsible party status.

1. Was the release a result of a single leak or an ongoing release? *Wenwest*:

First, ASI had only a very limited, single release (on the order of 698 gallons) over a defined three month period of time upon learning of a one-time leak, petitioner quickly repaired the leak. And, technical reports show that it is unlikely that a substantial portion of the 698 gallons of petroleum product from the filling line impacted the soil and groundwater beneath the Roseville Site. (Law Technical Report, which is attached hereto as Exhibit E). There was no evidence of an ongoing leak

during ASI's operation after the repair. The ASI leak was addressed, and soils and groundwater testing conducted after the leak was repaired indicated that the spill was primarily limited to soils surrounding the leak in the fuel line. Groundwater monitoring after the spill indicated little or no impacts to groundwater (*Wenwest*). In contrast, the CAO and other reports conducted for the Roseville Site indicate that EZ-Serve, which acquired ASI's leasehold interest and environmental duties and liabilities, conducted gas station operations at the Roseville Site from and after 1984, and was the operator when all three 10,000 gallon USTs released hydrocarbons for an extended period of time, until discovered in 1992.

2. Did the (prior owner) have a significant ownership interest in the property at the time of the discharge? ***Stuart:***

Both ASI, predecessor to VRG, and EZ-Serve, predecessor to RPMS held a leasehold interest. However, ASI held the leasehold interest at the time of its own, quite limited release. EZ-Serve held this interest subject to the ASI release, and at the time of its own, far more major release. During both periods of time and both discharges, the fee owners of the Roseville Site were Raymond and Marjorie Lieser (the "Liesers"), predecessors in interest to JEM1. There is no indication in the CAO or in those reports that VRG has been able to retain and review to date to indicate that, at any point in time, the Liesers or JEM1 lacked financial resources, authority or wherewithal to address the contamination issues at the site.

3. Did the discharger have knowledge of the activities, which resulted in the discharge? ***Stuart.***

ASI had notice only of its limited discharge, and, after 1985, EZ-Serve acquired all environmental liability and responsibility, and indemnified ASI from any environmental liability that might arise during EZ-Serve operations. There is no indication in the materials available to date that ASI knew, or had reason to know of the major EZ-Serve release prior to the beginning of full-scale remediation efforts by EZ-Serve sometime after 1992. The Liesers, however, were fee owners of the Roseville Site during the term of both the ASI and the EZ-Serve releases.

4. Did they have the legal ability to prevent the discharge? *Stuart.*

At the time of the major discharge by EZ-Serve, ASI had no interest in the Roseville Site, and no connection to, or authority over EZ-Serve that would have allowed ASI to prevent or remediate the major discharge contributing to contamination of groundwater at the site, which resulted from releases during the period that EZ-Serve operated the site. In fact, given EZ-Serve's assumption of liability and indemnification of ASI and its successors in interest, ASI had no interest to protect with respect to environmental liability or cleanup that could even have ostensibly justified ASI's interference of EZ-Serve's operations at, or quiet enjoyment of the Roseville Site. In contrast, EZ-Serve specifically acquired and assumed the duty and obligation to address, and liability for addressing ASI's release at the time that it acquired ASI's leasehold interest. This transaction gave EZ-Serve a direct interest in controlling and addressing the prior limited release by ASI. During the period of both the ASI and the EZ-Serve leases, the Liesers owned the fee interest, which is an interest in really property that would typically afford the owner with the right to prevent or to require tenants to take actions to prevent, discharges and release of pollutants.

5. Were there multiple responsible parties who are also properly named in the Order? *Wenwest.*

There are multiple responsible parties who are also named in the Order. Of those parties, VRG is the *only* party without sufficient legal access to the Roseville Site to proceed with remedial activities. Legal, technical and practical obstacles to VRG's ability to conduct remedial activities at the site, which distinguish VRG from both JEM1 and RPMS, include VRG's lack of property rights and legal access to the Roseville Site, as well as lack of adequate access to critical information, reports and data about the Roseville Site and historical site investigations, monitoring, sampling, contamination characterization and cleanup activities implemented thereon..

6. Does the discharger have a legal obligation to carry out the cleanup if other parties are currently cleaning up the site? *Prudential.*

Because EZ-Serve, and later RPMS, assumed all environmental liability and indemnified ASI and VRG, neither ASI nor VRG have a legal obligation to carry out the cleanup, unless and until the primary responsible party fails to do so. The Orders do not provide any information as to the legal

obligation of JEM1 to cleanup if other parties are currently cleaning up at the site, but such information is required for an appropriate analysis and designated of responsible parties under the Orders.

7. Is the cleanup being progressed by another responsible party? *Prudential.*

According to public records and the reports VRG obtained from Geotracker, RMPS's consultants, indicate that the site investigation and cleanup are progressing in an orderly fashion. (*Prudential, Wenwest*). As a result of these efforts by RPMS, hydrocarbon contamination levels have been reduced at the Roseville Site. Further, RPMS has obtained $500,000 in funding for these activities from the UST fund, and potential access to additional funding of up to an additional $1 million for funding to implement investigation, characterization and clean up activities at the site. Consequently, RPMS has funding to continue to perform investigation and cleanup activities at the Roseville Site. RPMS has responded to the Regional Board's directives to investigate the contamination at the Roseville Site, has installed certain hydrocarbon removal equipment, and is negotiating the need to install additional hydrocarbon removal equipment with the Regional Board.

For the foregoing reasons, VRG is entitled to a designation as a secondarily responsible party. This conclusion is inconsistent with State Board decisions in cases similar to this situation. For example, in *Prudential, supra,* the petitioner was a landowner who knowingly leased his property to manufacturing companies that released Volatile Organic Compounds (VOCs) to the environment. When one tenant moved out, petitioner leased the property to a similar manufacturing company who also used and released VOCs to the environment. Petitioner was aware that past releases of VOCs at the site contaminated the soil and groundwater, but continued to lease his site to companies that could contribute to the contamination at the Site. Like VRG, however, the property owner had provisions in its lease agreements that clearly made the tenants responsible for the VOC contamination known to have been released into the environment.[10] Further, the other dischargers (i.e., tenants) had been conducting the environmental remediation and investigation at the site. The State Board reasoned:

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[10] Similarly, the Liesers in this situation knowingly leased their property to gas station operators, despite repeated spills and releases, which they apparently knew had occurred. The CAO does not have any findings, and we have not yet encountered any information explaining the extent to which the Liesers may or may not have included provisions in their Leases making tenants fully responsible for discharges occurring during tenant operations. Such information is required for an appropriate designation of party liability under the Orders.

> "There is nothing improper about making petitioner do anything in the time schedule order which other responsible dischargers fail to do. The fallacy in the Regional Board Order has been identified by the petitioner. If Micro Power or Fairchild are to turn in a report on June 1, Prudential will not necessarily know until June 2 that they have not done so. By then, it would have been too late for petitioner to comply with the time schedule. Thus, in order to for the petitioner to ensure that it does not violate the order, it will have to assume that there will be non-compliance on the part of both the other parties and comply independently. In view of its somewhat limited access to the property, it will be difficult for the petitioner to conduct the on-site tests needed to comply. . . .
> The difficult position into which the petitioner has been placed does not further any legitimate public purpose. The petitioner is named in the order and bears ultimate responsibility for everything in it. A more careful crafting of the Regional Board order [to specify that the primary responsible parties are required to comply with the time scheduled activities] would satisfy all concerned while protecting the public's interest in seeing that the pollution is cleaned up."

(*Prudential* at p. 4-5).

VRG would be placed in the identical position as the party in *Prudential* in this instance. RPMS has indemnified VRG and has been conducting the site investigations, monitoring, sampling and cleanup activities at the Roseville Site since 1992, using the UST funds that have been made available for the Site. By being placed in the same category as RPMS, as a primarily responsible party, VRG would need to assume that the other responsible parties will not comply with the Orders and comply independently or bear the risk of not meeting the time scheduled orders. For the reasons articulated in the *Prudential* decision, holding VRG as a primary responsible party in the Orders is an abuse of Regional Board discretion.

C. Analysis: The Regional Board Abused Its Discretion by Failing to Classify VRG as a Secondary Responsible Party Pursuant to the Requirements of Policy 92-49.

Putting aside the Regional Board's abuse of discretion in failing to consider VRG as a secondarily responsible party as discussed above, VRG notes that even if had the Regional Board come to the wrong conclusion that it was primarily responsible for the site investigations, monitoring, sampling and cleanup activities at the Roseville Site, the Orders' designation of VRG as a responsible party, with identical obligations and compliance deadlines as RPMS, is arbitrary and capricious under the circumstances of this case.

Any finding made in a Clean-up and Abatement Order regarding an entity's status as a "responsible party" must be premised upon substantial evidence in the record. (*See In the Matter of the*

Petition of Exxon Company, California State Water Resources Control Board, Order No. WQ 85-7 at pp. 10-11 (1985)). Notwithstanding the averments of Regional Board Staff to the contrary, a Regional Board is not required to name all potentially responsible dischargers under a Clean up and Abatement Order, and indeed in some cases would violate State Board policy by naming every conceivable potentially responsible party as a "discharger." (*See generally* Policy 92-49 at ¶ ¶ I.B, III.B). As a prerequisite to naming VRG as a Discharger, Regional Board Staff were required to demonstrate that VRG (and/or its predecessors in interest from whom environmental liability may be imputed) caused or permitted the current contamination of the Roseville Site.

Notwithstanding the rudimentary factual allegations made in CAO §§ 4-5, at page 2, it is not clear whether the predecessor of VRG, ASI, significantly caused or contributed to the current condition of pollution identified at the Roseville Site so as to justify being named as a "Discharger" under the CAO with clean-up obligations equal to those of RPMS. Moreover, monitoring well data from the mid-1980s shows non-detects or a "minute quantity" of petroleum in groundwater in the immediate vicinity of ASI's relatively small fuel line leak, and a geohydrologic study conducted by ASI indicated minimal risk of adverse impacts to groundwater. (*See* Attachments to November 15, 2007 letter, which is attached hereto as Exhibit A). A limited impact from the ASI spill in 1983 is not surprising given the limited nature and duration of the spill (698 gallons over a three month period) and small likelihood that a substantial portion of that spill impacted the soil and groundwater beneath the Roseville Site. (Law Engineering Report, which is attached hereto as Exhibit E). Additionally, the amount of the spill, estimated from sales records, may be overstated as a result of failure to consider fuel loss associated with fuel lost as vapor to the atmosphere during dispensing, leakage from the nozzle before and after vehicle fueling, or inaccurate calibration of the pumps. Moreover, any fuel spilled in 1983 has had approximately 25 years to naturally attenuate and vaporize from the soil to the air. Thus, there is insufficient evidence in the record that the current site contamination was caused by anything other than EZ-Serve and their long term operation of, releases from, and abandonment of three underground storage tanks at the Roseville Site.

Requiring VRG to undertake the identical responsibilities under the Orders to that of RPMS, the successor in interest to EZ-Serve, is not an outcome supported by substantial evidence in the record. It

would violate Policy 92-49 while yielding an inequitable and arbitrary/capricious result. There is no basis reflected in the Orders or other information currently available to VRG for the Regional Board to mandate that VRG conduct a duplicative investigation and cleanup, conduct identical monitoring, and submit identical reports for the Roseville Site when RPMS is a current responsible party, with access to additional UST Cleanup Fund proceeds, that is already conducting all required work (albeit at a pace that apparently is deemed inappropriate by Regional Board Staff). Such duplicative action wastes resources without improving environmental benefit, yet that is the result that VRG's compliance with the Orders in their current form would yield. Indeed, requiring VRG to perform tasks associated with duplicative site assessment, monitoring, sampling and cleanup activities when RPMS is likely to have its "proposed remedial system up and running shortly,"[11] not only would be entirely duplicative and wasteful, but may also actually delay environmental cleanup at the Roseville Site. Moreover, requiring VRG to cover the same ground already covered by RPMS in existing site characterization, monitoring, and sampling and investigation reports and workplans violates the step-by-step process and consideration of economics and efficiency mandated in clean-up efforts by State Board policy. (*See, e.g.*, State Board Resolution No. 92-49 at ¶ III.B, directing Regional Boards to "[c]onsider whether the burden, including costs, of reports required of the discharger during the investigation and cleanup and abatement of a discharge bears a reasonable relationship to the need for the reports and the benefits to be obtained from the reports.").

D. The Orders Should Be Amended to Assure that VRG Is a Secondarily Responsible Party that is Only Responsible for Implementation In the Event that the Regional Board Finds that RPMS is Unable or Unwilling to Comply.

To the extent that VRG is properly included as discharger under the Orders, equity—and State Board precedent -- suggests that VRG should not be apportioned a "substantial portion" of the costs or duties under the Order. (*See In the Matter of the Petitions of the County of San Diego, et al,* Order No. WQ 96-2 at page 12 n. 8). Because it appears that ASI's contribution to the condition of contamination at the Roseville Site was minimal at best, and because RPMS is apparently capable of (and contractually

[11] *See* Electronic Correspondence of October 26, 2007 from Paul Sanders to Darren W. Stroud, which is attached hereto as Exhibit C.

bound) to finish any additional tasks related to cleanup of the Site, the most sensible solution is for the Regional Board, to the extent it chooses to retain VRG as a Discharger under the Orders, to impose the obligations contained in the Orders on VRG only if RPMS becomes incapable of, or refuses to perform its obligations under the Orders. By making RPMS's failure a condition to imposing an obligation on VRG, VRG and the Regional Board would then have sufficient leverage to induce RPMS to perform the tasks under the Orders under the threat of both direct and focused regulatory enforcement by the Regional Board and civil litigation by VRG to enforce the lease transfer agreement and indemnity provisions. By applying the Orders to VRG only where RPMS is unable or unwilling to undertake a mandated task, the Regional Board avoids providing incentive to RPMS to violate the Orders, and obtains the additional leverage that VRG can apply to RPMS without creating the unnecessary duplicative and costly effort that is forbidden by Policy 92-49. Indeed taking this approach is fully consistent with the Policy 92-49's goal to facilitate environmentally responsible action in the absence of direct Regional Board regulatory oversight. (*See, e.g.,* Policy 92-49 at ¶ II.B, encouraging Regional Boards to "identify investigative and cleanup and abatement activities that the discharger could undertake without Regional Water Board oversight.").

III. THE COMPLIANCE SCHEDULE SET FORTH IN THE ORDERS IS INFEASIBLE FOR VRG TO MEET.

While VRG hopes that RPMS and JEM1 will fulfill their obligations and that VRG will not need to assume their cleanup activities, the Regional Board's Orders currently specify a compliance schedule that is infeasible for VRG to meet. In particular, compliance with the first compliance schedule deadline, June 6, 2008 is infeasible. The Orders mandate that, by June 6, 2008, several substantial tasks and requirements must be completed, including the following: preparation of a detailed site chronology; completion and preparation of a report on the results of the "HVDPE and AS Test" arising out of a February 14, 2008 directive to prepare a workplan that was never sent to VRG ; development and implementation of a "modified Corrective Action Plan" ; and development and implementation of a work plan to conduct a human health risk assessment; develop a public participation plan, and conduct sampling, monitoring and reporting at the Roseville Site.

Compliance with these obligations is infeasible for VRG because neither VRG nor its predecessor in interest have had any involvement with the Roseville Site for more than 20 years. Based on its lack of connection to, and involvement with the Site, VRG currently has no right to access the Roseville Site, which is owned in fee by JEM1. Further, VRG does not have immediate access to or possession of investigation, characterization or monitoring reports, workplans and Regional Board Responses to workplans, corrective action plans or Regional Board responses to corrective action plans, or other historical information or data critical to assessing current circumstances, and proceeding with efficient and effective implementation of clean up activities. Compounding these issues, unlike the Regional Board, VRG has no enforcement authority to compel RPMS to cooperate with VRG in organizing and implementing clean up activities, and while VRG may be contractually entitled to performance of those activities by RPMS, VRG's only recourse against RPMS to enforce its contractual rights is via civil litigation, which is not a timely, efficient or particularly effective remedy for purposes of achieving cleanup action. In fact, VRG has only recently located RPMS in order to effect delivery of a letter demanding that RPMS honor its contractual duties and responsibilities with respect to clean up of the Roseville Site.

Due to these substantial practical, legal and technical obstacles to VRG's compliance with the Orders" deadlines, and particularly the June 6, 2008 deadline, does not provide sufficient time for VRG to attain access, review information and data, and meet with other potentially responsible parties as necessary to properly implement cleanup activities at the Roseville Site.

A. Applicable Law and Policy.

A Regional Board order must provide a feasible compliance timelines that allows VRG the time to conduct an orderly step-by step investigation and must be consider VRG's technical and financial resources. (*See* Policy 92-49). The State Board had previously ruled that the failure of the Regional Board to issue a feasible time scheduled compliance order is arbitrary and capricious under the California Administrative Procedure Act. (*See In the Matter of the Petition of BKK Corp.,* California State Water Resources Control Board, Order No. WQ 86-13 at p.16 (1986)). Further, the Orders likely violate VRG's procedural due process rights. (*See Horn v. County of Ventura*, 24 Cal.3d 605, 612

(1979) ("Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.")).

B. Analysis: The Compliance Schedule Set Forth in the Orders is Inappropriate, Arbitrary and Capricious Because it Fails to Set Compliance Deadlines that are Reasonable and Feasible to Meet.

Compliance with these obligations is infeasible for VRG because neither VRG nor its predecessor in interest have had any involvement with the Roseville Site for more than 20 years. Based on its lack of connection to, and involvement with the Site, VRG currently has no right to access the Roseville Site, which is owned in fee by JEM1, LLC. Further, VRG does not have immediate access to or possession of investigation, characterization or monitoring reports, workplans and Regional Board Responses to workplans, corrective action plans or Regional Board responses to corrective action plans, or other historical information or data critical to assessing current circumstances, and proceeding with efficient and effective implementation of clean up activities. Compounding these issues, unlike the Regional Board, VRG has no enforcement authority to compel RPMS to cooperate with VRG in organizing and implementing clean up activities, and while VRG may be contractually entitled to performance of those activities by RPMS, VRG's only recourse against RPMS to enforce its contractual rights is via civil litigation, which is not a timely, efficient or particularly effective remedy for purposes of achieving cleanup action. In fact, VRG has only recently located RPMS in order to effect delivery of a letter demanding that RPMS honor its contractual duties and responsibilities with respect to clean up of the Roseville Site.

Due to these substantial practical, legal and technical obstacles to VRG's compliance with the Orders" deadlines, and particularly the June 6, 2008 deadline, does not provide sufficient time for VRG to attain access, review information and data, and meet with other potentially responsible parties as necessary to properly implement cleanup activities at the Roseville Site.

C. The Orders Should Be Amended to Assure Feasible Compliance Deadlines.

Based on VRG's consultant (LFR) review of documents obtained from Geotracker and from file reviews performed at the City of Roseville Fire Department and the Regional Board, LFR made the following comments (on May 1, 2008) to the requirements set forth in the CAO:

- The deadline to implement the Work Plan to Use CalClean Inc. and prepare a report including a modified CAP, is unattainable and a more realistic deadline is September 15, 2008 (as of May 1, 2008). This modified deadline and all other deadlines included in the CAO are attainable with the caveat that authorization to begin work is granted by May 9, 2008 and Site access is obtained no later than June 15, 2008.
- Based on the content of the Work Plan to Use CalClean Inc., LFR does not agree that implementation of this Work Plan is the best use of economic resources to remediate the Site. Implementation of this Work Plan could be helpful towards Site remediation but a more detailed explanation as to how groundwater is proposed to be extracted is necessary.
- Additionally, it should be evaluated that upon completion of the 60-day event that we would be somehow closer to Site closure. Depending on the costs of the proposed 60-day event, it may be more economical to utilize existing Site piping and install a fixed groundwater extraction system. However, if the Work Plan were to be implemented in order to abide by the CAO, LFR would recommend that the maximum volume of groundwater be extracted and treated during the event.
- Based on a review of the available data, an evaluation into the potential for plume commingling with the Exxon Station to the southwest would be recommended.

In summary, LFR's concluded that while the requirements in the CAO are feasible for RPMS, who already has the technical background with the contamination at the Roseville Site and are intimately familiar with the plans submitted with the Regional Board, LFR would likely recommend the use of different technologies and may require additional data prior to developing a plan that is economical and effective, given the nature of the contamination and the local hydrogeology.

IV. PROCEDURAL ERRORS REQUIRE DEPRIVE VRG OF DUE PROCESS.

VRG, like the other named Dischargers, has substantial property interests, resources and assets that are *potentially* jeopardized via the issuance of the Orders. The Orders threaten VRG's interests because the requirements of those Orders, including requirements related to designation of VRG as a primarily responsible party and inclusion in the Orders of mandatory, but infeasible compliance

deadlines, were adopted without sufficient procedural protections to assure adequate consideration of applicable law and policy and the specific facts and circumstances of this matter.

A number of procedural errors occurred in issuance of the Orders, adversely affecting the interests of VRG and depriving VRG of due process. For example, VRG was provided less than a month to comment upon the Draft Orders November 2007 on a site for which records were difficult to obtain because the site was last operated by one of VRG's subsidiaries over 23 years ago. The Regional Board also failed to provide responses to VRG's November 2007 letter and instead issued the order without final notice to VRG that it intended to do so. Additionally, the final Orders were issued without VRG having an opportunity to meet with and negotiate a solution with the other Dischargers prior to the Regional Board issuance of final Order – had the Dischargers negotiated a resolution to the contamination at the Site, there would be no need for the Orders and this appeal. Moreover, the Assistant Executive Officer also issued the Orders without permitting VRG to present evidence that it should not be a primary responsible party to the Orders – while VRG understands that "ex parte" orders are appropriate when such orders are necessary to address an imminent threat to human heath and the environment, no such condition existed at this site. Finally, the Regional Board issued Orders that contained time scheduled requirements without VRG's input which are impossible for VRG to meet because of its unfamiliarity of the Roseville Site and the technical studies that have been conducted over the past several years.

In improperly naming VRG as a Discharger, the Regional Board has exposed VRG assets to liability for cleanup costs, that would be otherwise protected from environmental liability by both legal principles under Porter-Cologne and by contractual and indemnity provisions granted by RPMS. In addition, the mandated compliance schedule set forth in the Orders, which VRG cannot feasibly meet, expose VRG's assets, and though improbable, potentially VRG's liberty interests to inappropriate liability for satisfaction of civil and criminal enforcement penalties that might be assessed by the Regional Board beginning as early as June 6, 2008. Moreover, requiring VRG to cover the same ground already covered by RPMS in existing site characterization and investigation reports and workplans violates the step-by-step process and consideration of economics and efficiency mandated in clean-up efforts by State Board policy. (*See, e.g.*, Policy 92-49 at ¶ III.B).

A. Issuance of the Orders Without and Opportunity for Hearing Violated VRG's Rights to Due Process.

Decisions of the State Board indicate that the Executive Officer may issue a Cleanup and Abatement order without a hearing, but solely based on the need to take immediate action to protect human health and the environment. Even if immediate action was required after 24 years of cleanup activity at the Site, a dubious proposition on the record before the Board, VRG was still entitled to a hearing before the Regional Board *after the issuance* of the CAO. (*See Horn v. County of Ventura*, 24 Cal.3d 605, 612 (1979) ("Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.")). As noted in VRG's time-constrained review to date of site investigation reports for the Roseville Site, the contamination appears to be contained, remedial actions taken to date have lowered the contamination levels in the groundwater beneath the site, and RPMS is proceeding with remedial actions. The State Board has explained that any potential short-term harm to the constitutionally protected interests of a named responsible party that might otherwise arise by virtue of an Executive Officer's "ex parte" action to issue a order in the absence of formal procedures, is ameliorated by the fact that named responsible parties are able to petition the Regional Board for modification of the order after issuance, or appeal the action of the Executive Officer to the State Board. (*See In the Matter of the Petition of BKK Corp.,* California State Water Resources Control Board, Order No. WQ 86-13 at p.5 (1986)). In this case, due to VRG's limited knowledge of the Roseville Site, and the information, data, and reports generated to date regarding the site and the contamination, recourse to the State Board is less protective of VRG's interests that is appropriate, particularly in light of the significant legal and consulting fees required just to prepare an appeal that sufficiently raises VRG's immediately discernable and most critical issues.

In the circumstances surrounding the Roseville Site, it strains credulity for the Regional Board to assert that immediate issuance of the Orders is now required after 24 years of ongoing cleanup activity at the Site. As noted in VRG's time-constrained review to date of Orders, and a small subset of available site assessment reports for the Roseville Site, the contamination appears to be contained. Remedial actions taken to date have lowered the contamination levels in the groundwater beneath the site, and RPMS has been proceeding with remedial actions and according to the CAO alone, has

expended at least $500,000 implementing investigation, monitoring, characterization and clean up actions. Under these circumstances, it is difficult to ascertain the circumstances that Regional Board Staff determined to constitute "a need for immediate action to protect human health and the environment."

The Orders do not contain any clear finding of the need for immediate action protect human health and the environment. There is no finding in the Orders that any beneficial use of any surface or groundwater is imperiled by current conditions. The CAO's oblique references in Sections 8-10, page 3, to potential installation of new municipal supply wells within the City of Roseville at some future date, and the presence of "Dry Creek" approximately 1,500 feet away, do not establish that the relatively minor plume of petroleum constituents within the soil and groundwater at the Roseville Site actually constitutes a threat to municipal water supply or riparian beneficial uses of surface our groundwater. Indeed, the Orders never state that beneficial uses are imperiled. Similarly, the CAO's assertion in Section 8, page 3 that petroleum constituents in the groundwater "remain well above established numerical water quality objectives" is also puzzling. A cursory review of the Central Valley Basin Plan reveals no established numeric water quality objectives for any of the constituents listed in Sections 8 or 23 of the CAO, and it does not appear that the Regional Board has not complied with Cal. Water Code §13263 and §13241 requirements for the setting of site-specific water quality objectives or safe drinking water maximum contaminant level to the untreated groundwater beneath the Roseville Site.[12] Thus, circumstances justifying issuance of the Orders without a hearing, and denial of VRG's request for hearing appear to be error resulting in the adoption of inappropriate and infeasible requirements, and necessitating a petition to the State Board.

While VRG appreciates that it has the right to appeal the Assistant Executive Officer's Orders to the State Board, under the circumstances, the appeal to the State Board does not sufficiently protect VRG's interests. VRG was required to prepare this petition with the limited record that was available to VRG at the time that the Regional Board surprised VRG with its Orders. The Orders were issued without the benefit of any meetings between VRG and the Regional Board Staff or any of the other

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[12] More detailed comments pertaining to the requirements for establishing numeric water quality objectives in an enforcement action were previously provided to the Regional Board in the November 15, 2007 letter, which is attached hereto as Exhibit A.

stakeholders. Regional Board Staff denied VRG's request for a short extension to allow VRG to meet with the Board to assess the site and appropriate response. The Regional Board Staff's failure to provide VRG with an evidentiary hearing prior to, or, at a minimum, after adopting the Orders violated its due process rights because VRG did not have a meaningful opportunity to review evidence or present testimony in opposition to the Orders. Should the State Board not amend the Orders as requested above, VRG requests that the State Board, at a minimum, remand the Orders to the Regional Board for evidentiary hearings before the Board of the Central Valley Region on the issues raised and the amendments requested in this petition.

B. Issuance of the Orders Without Adequate Opportunity for Comment or Issuance of Response to Comments Violated Due Process.

Clean-up and Abatement Orders are adjudicative processes subject to review under the California Administrative Procedures Act. (*See* Michael A. Lauffer, Memorandum from Chief Counsel: Summary of Regulations Governing Adjudicative Proceedings Before the California Water Boards (August 2, 2006) at p. 2; *see also* Cal. Code Regs., tit. 23, §§ 648-648.8). To the extent that the Executive Officer chose not to accept VRG's substantive recommendations contained in the November 15, 2007 Letter, it was required to explain its rationale for so declining -- particularly where some of the revisions requested by VRG closely mirrored language utilized by the Regional Board in other Clean-up and Abatement Orders issued for other sites under its jurisdiction. Regional Board Staff's failure to explain the rationale for ignoring VRG's suggested revisions, and indeed failing to communicate in any way with VRG after receiving the November 15, 2007 Letter and prior to issuing the "Final" Orders on or around April 3, 2008, violated the California Administrative Procedures Act and VRG's due process rights.

Similarly, the Regional Board's failure to make findings of fact that reasonably relate the requirements of the Order, including designation of VRG as a primarily responsible party and adoption of infeasible compliance deadlines, to substantial evidence in the record supporting those requirements. Governmental processes, such as the development and issuance of the Orders, must proceed in full view of those parties potentially affected by such process. The Newman letter avers, again with no legal basis and contrary to the California APA, that an appeal to the State Board is the only recourse available to

VRG arising out of the adjudicative function summarily performed by Mr. Newman (in the absence of any apparent delegated authority) and his subordinates. What the Newman Letter neglects to appreciate is that in an adjudicative proceeding such as a CAO, evidentiary findings should be premised upon quasi-judicial procedures in the first instance—at least where a discharger questions the evidentiary basis for staff findings after issuance. The protection of individual rights addressed through Cal. Code Regs. tit. 23, §§ 648-648.8 is no less important when adjudicative decisions are made by Regional Board staff acting in an ex parte manner—than when the Board itself makes a decision upon evidentiary findings. Both potentially have the same conclusive effect on the adversely effected party (e.g., the only remedy is an appeal to the State Board), but unlike Board findings which must be premised upon substantial evidence in the record, staff findings in performing what appears to be the identical adjudicatory function may apparently, according to the Newman Letter, be premised entirely upon "because we said so." The California APA and its implementing regulations clearly do not contemplate the wielding of such unfettered discretion by an interested "decision maker" in adjudicative proceedings. (*See BKK Corporation* at 4-5). The matter should have been referred to the Regional Board for an evidentiary hearing as requested by VRG.

V. CONCLUSION.

For the reasons stated above, the State Board should amend the Orders to reflect that RPMS and JEM1 are responsible for conducting the time scheduled activities and that VRG is a secondary responsible party that will be required to perform the activities in accordance with an appropriate time schedule providing reasonable and feasible dates for compliance if the primary responsible parties become unable or unwilling to comply with the subject Orders. Should the State Board not amend the Orders, VRG requests that the State Board remand the Orders to the Regional Board with specific instructions to conduct an evidentiary hearing before the Regional Board to consider the matters, issues and requested amendments set forth in this Petition..

Dated: May 5, 2008

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